91-244

No. _____

In The

Supreme Court of the United States

October Term, 1991

JAMES L. BARNES, JR., LEONARD GREFSENG, ROY R. KIMBERLY, LELLWYN B. LACKEY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON AND JOSEPH D. PATRICK,

Petitioners,

v.

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.D. SELF AND ALABAMA GAS CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

James L. BARNES, Jr.,
Plaintiff-Appellee.

Leonard Grefseng, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick, Lellwyn B. Lacey [sic], Plaintiffs-Appellants.

v.

A.S. LACY, D.C. Reynolds, Energen Benefits Committee, Energen Corporation, Energen Retirement Income Plan, G.C. Ketcham, G.C. Youngblood, J.A. Martin, R.J. Patzke, W.D. Self, Alabama Gas Corp., Alabama Gas Corporation, Defendants-Appellees, Appellants.

No. 90-7228.

United States Court of Appeals.
Eleventh Circuit.

March 22, 1991.
Rehearing Denied May 9, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

FAY, Circuit Judge:

Plaintiffs James L. Barnes, Jr., Leonard Grefseng, Lila Faye Huey, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick, and Lellwyn B. Lackey sued defendants A.S. Lacy, D.C. Reynolds, Energen Benefits Committee, Energen Corporation, Energen Retirement Income Plan, G.C. Ketcham, G.C. Youngblood, J.A. Martin, R.J. Patzke, W.D. Self, and Alabama

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Gas Corporation (hereinafter collectively referred to as "Alagasco"), alleging misrepresentation and violation of ERISA with respect to two early retirement plans that Alagasco had offered its employees. The district court granted judgment in favor of plaintiff Barnes, but held in favor of Alagasco with respect to the remaining eight plaintiffs. Seven of the eight plaintiffs who were defeated at trial appealed, and Alagasco cross-appealed the court's decision in favor of Barnes.

We find no clear error in the district court's factual findings. Accordingly, we AFFIRM the court's order granting judgment in favor of Alagasco with respect to the eight defendants other than Barnes. However, we hold that the court erred in finding Alagasco liable for misrepresentation. The court found Alagasco liable because Barnes misunderstood and detrimentally relied upon Alagasco's representations; yet it found, as a matter of fact, that Alagasco had made only truthful representations, in good faith, to its employees. We find that, based on the court's factual findings, its holding against Alagasco was erroneous as a matter of law. Accordingly, we REVERSE the district court's order granting judgment in favor of Barnes and REMAND with instructions to enter judgment in favor of Alagasco.

Background

In November of 1985, Alagasco announced that it was forming a Voluntary Early Retirement Opportunity plan ("VERO"). The plan was adopted to provide additional incentives for employees, who already were eligible to take early retirement under Alagasco's Retirement

Income Plan (the "Energen Plan"), to elect to do so. VERO was available only to those employees who either were already eligible for early retirement or would be by January 1, 1986.

About 80 persons were eligible under VERO. Over 50 percent of those eligible elected to retire on the basis of VERO. Nine of those persons who retired under VERO ultimately sued Alagasco asserting that, although they voluntarily and without coercion had elected to take that early retirement, they had been induced to do so by misleading or ambiguous statements provided to them concerning VERO.

This claim of misrepresentation essentially arose out of Alagasco's announcement in November of 1987, two years after VERO, of a new opportunity for early retirement. This second program, Voluntary Retirement Incentive Program ("VRIP"), provided various benefits that were greater than those which the plaintiffs had obtained under VERO. Plaintiffs asserted that the company misadvised them concerning the original plan by announcing at that time that it was a "ōne-time offer." They claimed that they understood Alagasco's comment to mean that they would not have any later opportunity for enhanced early retirement beyond that provided under the plan itself. Alagasco asserted that its use of the words "one-time offer" was proper and not misleading, and that it related essentially to the window of time from November 15, 1985 through December 6, 1985, in which eligible employees could elect to take advantage of VERO.

In its findings of fact, the trial court determined that plaintiffs had failed to show that Alagasco either contemplated or intended to offer a voluntary retirement incentive plan subsequent to VERO. Clear evidence offered at

trial established that in late 1985, when Alagasco had decided to make VERO available, Alagasco did not anticipate that it would make any further or later offers of early retirement, that it believed that it would be unable to make any such offers on a cost-neutral basis, and that no such offers were, indeed, anticipated. Accordingly, the court found that Alagasco never intended to mislead plaintiffs. Quite to the contrary, the court held that Alagasco intended "to provide accurate and full information that the employees would need in order to make their own individual decisions."

Additionally, the court did not specifically point to any violation of ERISA on the part of Alagasco. Instead, it applied trust principles of fiduciary responsibility to Alagasco with respect to its explanation of the VERO offer. Alagasco does not contest whether it should have been held to the standard of a fiduciary under ERISA with respect to the employees under the VERO plan. Alagasco merely claims that, based upon the information available to it at the time in question, it made no material misrepresentation, either by false statement or omission, regarding the prospect of a subsequent early retirement incentive plan. Thus, even if it should be held to some standard of fiduciary responsibility, Alagasco maintains that it did not violate its fiduciary duty to its employees.

The court held that Alagasco did mislead eight of the nine plaintiffs by failing to disclose that the company reserved the right to consider making benefits available in the future – whether higher, lower, or the same – at any time it wished to do so. The court then weighed the testimony of the remaining eight defendants with respect to whether they in fact relied upon the "misleading" offer

to elect VERO. The court found that, in fact, only plaintiff Barnes would not have accepted VERO if the "correct" information had been given. Accordingly, the court granted judgment in favor of Barnes, and in favor of Alagasco as to the eight other plaintiffs.

Analysis

1. *Findings of Fact.*

Federal Rule of Civil Procedure 52(a) provides that a district court's findings of fact in actions tried without a jury may not be reversed unless clearly erroneous. Fed.R.Civ.P. 52(a); *United States v. Fidelity Capital Corp.*, 920 F.2d 827, 836 (11th Cir.1991). The rule also provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed.R.Civ.P. 52(a). If the court's findings are " 'plausible in light of the record viewed in its entirety,' the court of appeals must accept them even if it is 'convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *Fidelity Capital Corp.*, 920 F.2d at 836 n. 36 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)); *see also Worsham v. United States*, 828 F.2d 1525, 1526-27 (11th Cir.1987). The district court in this case made various findings of fact, most of which the parties do not dispute. The seven plaintiffs other than Barnes who have appealed essentially dispute only one area of the court's findings. They assert that the court clearly erred in finding that eight of the nine plaintiffs would have elected VERO even if Alagasco had disclosed such information to them.

In light of the record before us, the district court's explanation of its holding,[1] and the limited scope of our

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[1] As to plaintiff Huey (who did not appeal the district court's decision), the court found that she actually was notified of Alagasco's reservation of the right to offer benefits in the future. At trial, it was revealed that Mrs. Huey was present at a meeting where an Alagasco representative explained the meaning of "one-time" offer. The representative "indicated that there simply were no plans to have any such later offer made, but that of course, 'one could never say never' – the intent being and the content being that the company did reserve the right to make such decisions at a later date if it chose to do so." (R5-8-9). Therefore, the court held that Alagasco did not mislead Mrs. Huey.

The court found that plaintiff Grefseng had made his decision to accept VERO before he even learned of the "one-time only" condition. As a result, the court determined that Grefseng would have accepted VERO even if Alagasco had disclosed its right to offer subsequent benefits. Plaintiff Kimberly was in bad health and had considered retirement even before VERO was offered. Therefore the court concluded that he also would have accepted VERO even if he had known that a later offer might be made. As to plaintiffs Lackey and Moore, the court paid special attention to the fact that the benefits under VERO were substantially higher to them based upon their ages than they would have been under normal earlier retirement. Consequently, the court reasoned that the plaintiffs would have accepted VERO even if Alagasco had communicated the information regarding the prospect of future benefits to them. As to plaintiff Little, the court recognized that because he was already age 63 when VERO was offered, he simply would not have waited to take early retirement on the basis of a statement declaring "that the company, of course, might at some future time – which might be two years or three years or six years – have considered some additional early retirement plan." Plaintiff Northington was not actively working with the company, was unhappy with her position, and was expecting

(Continued on following page)

review, we cannot say that the court was clearly erroneous in judging the credibility of each of the witnesses. The district court acknowledged the speculative nature of testimony on this issue. Further, the court conceded that, in making a factual determination, it had to draw fine lines of distinction in crediting testimony. Although we recognize, as did the district court, that it did indeed cut a fine line in weighing the plaintiffs' testimony, such a distinction does not, alone, constitute clear error. We therefore AFFIRM the district court's grant of judgment in favor of Alagasco with respect to plaintiffs Grefseng, Kimberly, Little, Moore, Northington, Patrick, and Lackey.

2. *Conclusions of law.*

In contrast to the standard of review of findings of fact, our review of the district court's application of the law to its findings of fact is de novo. *Fidelity Capital Corp.*, 920 F.2d at 836 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 486, 104 S.Ct. 1949, 1952, 80 L.Ed.2d 502 (1984) (Rule 52(a) "does not inhibit an

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(Continued from previous page)

to request a transfer upon her return to work. So, the court determined that she would have accepted the plan notwithstanding Alagasco's failure to disclose the information. Finally, plaintiff Patrick was likewise unhappy with his job and received substantially higher benefits by retiring at age 57 than he would have under normal early retirement, even if he were age 62. As with the other plaintiffs, the court concluded that he would have elected early retirement under VERO even if Alagasco had related its intent to retain the right to offer benefits in the future.

appellate court's power to correct errors of law"); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir.1990)). The district court made several factual findings regarding Alagasco's conduct. Alagasco had told its employees the truth about VERO. Alagasco had no intent to mislead employees regarding whether any future offers would be made following the VERO offer. The evidence clearly established that, at the time Alagasco made VERO available to its employees, "it did not contemplate making any further or later offers of retirement." (R5-4). Alagasco's comments regarding VERO being a "one-time offer" were not in and of themselves misleading. Despite these factual findings, the court held that Alagasco was, as a fiduciary under ERISA, liable for misrepresentation. The court found that Alagasco had committed a misrepresentation on the basis that the company's statements were subject to being misunderstood by employees. (R5-17). In effect, the court ruled that Alagasco had, and had breached, a duty to announce its intention to reserve the right to offer a subsequent early retirement plan, even though no such plan was even contemplated.

ERISA contains detailed disclosure rules by which employers and plan administrators must abide. *See* 29 U.S.C. § 1021 *et seq*. One such disclosure requirement is the publication of a summary plan description ("SPD"). The SPD is Congress's established method for apprising participants of the terms of a particular plan.

Alagasco's Energen Plan was the underlying retirement plan to which both VERO and VRIP added incentives for early retirement. Alagasco also published a SPD of the Energen Plan which described the terms of the plan. Article 8.1 of the Energen plan expressly states the

Alagasco's reservation of discretion to amend the terms of the Energen Plan: "The Board shall have the right to amend the Plan from time to time. . . . " The Energen Plan's SPD also expressly states Alagasco's power to amend the plan. Counsel for Alagasco has represented that both the Energen Plan and the SPD were available to all employees. The plaintiffs, as participants in the Plan, might be said to have constructive knowledge of the Plan language. *See Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 680 (5th Cir.1989) (plaintiff "charged with knowledge of the plan"). Additionally, the VERO plan itself was made pursuant to Article 8.1 of the Energen Plan. Alagasco complied with the disclosure rules mandated by Congress in ERISA. The district court, in effect, created an additional notification requirement by requiring Alagasco to announce again to its employees its intention to retain the right to amend its retirement plan. Alagasco made no untrue statements to its employees regarding VERO or VRIP. The company complied with ERISA regarding disclosure. Accordingly, the district court erred in holding Alagasco liable because its comments might have been subject to misinterpretation.

However, even if the employees did not receive notice of Alagasco's intention to retain the right to amend its retirement plan, we hold in the alternative that Alagasco did not breach any fiduciary duty towards its employees. Generally, employers owe no fiduciary duty towards plan beneficiaries under ERISA. *See Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 229 (3rd Cir.1989). However, when employers choose to "wear two hats," i.e., act as both employer and plan administrator, ERISA fiduciary duties regarding plan administration attach. *Id.*

at 225. Yet, employers who act as plan administrators " 'assume fiduciary status "only when and to the extent" that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.' " *Id.* (quoting *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1416-17 (2d Cir.1985), *cert. dismissed*, 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986)). Neither party disputes that the employer, Alagasco, owed a fiduciary duty to the beneficiaries. Yet, even assuming that Alagasco owed a fiduciary duty to the plaintiffs in this case, the company did not breach such duty by failing to notify the employees of the amendment provisions in the plan.

The district court found that Alagasco made no untruthful statements. The "one-time offer" statements indicated Alagasco's actual intent at the time the statements were made. The court found that Alagasco acted completely in good faith with respect to both the VERO and VRIP incentive plans. We fail to see how a fiduciary could be held liable for making a good faith, truthful statement solely because the statement might be subject to misunderstanding. The district court, in so holding, placed an unreasonable burden upon Alagasco to predict future, unintended events. To impose such a duty is inequitable. *See Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir.1988). Alagasco could only be liable for such a predictive statement if it were a "material misrepresentation." *See id.* If, for example, Alagasco, "after *serious consideration* of a second [VERO] . . . , represented that [a later VERO offering] was not being

considered or used words to [that] effect, such a representation would be characterized as a material misrepresentation, although no final decision had been made." *Id.* at 1164 n. 7 (emphasis in original). In the case before us, Alagasco never even considered that a later offer would be made when it stated that VERO was a one time offer. Therefore we find that Alagasco made no material misrepresentation. Accordingly we REVERSE the decision of the district court granting judgment in favor of plaintiff Barnes. AFFIRM its decision against the other plaintiffs, and REMAND with instructions to enter judgment in favor of Alagasco as to all claims.

IN THE DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES L. BARNES, et al., Plaintiffs, vs. ALABAMA GAS CORPORATION, et al., Defendants.	CV-88-P-1453-S Birmingham, Alabama October 17, 1989 2:15 P.M. FILED 89 NOV 6 PM 4:17

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE HON. SAM C. POINTER, JR.

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[p. 2] FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THE COURT: The Court will now dictate findings of fact and conclusions of law. These findings are based upon the evidence that's been presented during the trial over the last two days. The evidence consists of testimony of various witnesses, together with the reception into evidence of various documents.

In November 1985, the defendant Alabama Gas Corporation announced the formation of something that in this litigation has been known as VERO, V-E-R-O, which stands for Voluntary Early Retirement Opportunity. This plan was adopted to provide additional incentives for employees, who already were eligible to take early retirement, to elect to do so. Various incentives were provided in order to induce the employees to take that election. The particular plan was available only to those employees who already were eligible for early retirement – or would be by January 1, 1986 – and who also satisfied a Rule of 80, meaning years of service plus age would be 80.

About 80 persons were eligible under that plan. Somewhat over 50 percent of those eligible elected to retire on the basis of that VERO. Nine of those persons now have brought this action against their former employer asserting that, although they voluntarily and without coercion had elected to take that early retirement, they had been induced to do so by misleading or ambiguous statements provided to them concerning [p. 3] that plan.

Basically, the claim arises out of and as a result of the announcement in November '87 of an additional opportunity for early retirement under what in this litigation has been called VRIP, or Voluntary Incentive Retirement Program. This second voluntary program provided various benefits that were greater than those which the plaintiffs had obtained under the VERO plan.

They have asserted in this lawsuit that the company misadvised them concerning the original plan by announcing that it was a "one-time offer", which they understood as a result of both written and oral communications to mean that they would not have any later opportunity for enhanced early retirement beyond that provided under the plan itself. The defendant asserts in this action that its use of the words "one-time offer" was proper and not misleading, and that it related essentially to the window of time from November 15, 1985 through December 6th, 1985, in which eligible employees could elect VERO.

Let me first say that to the extent the plaintiffs are claiming that by virtue of any ambiguity or omission they should simply have a right to rescind their earlier elections to retire, the Court concludes that is not a proper construction of law; instead, the plaintiffs in order to receive the benefits they seek in this litigation must establish that they [p. 4] relied upon some misinformation or omission, and, in short, that they would not have elected VERO if they had been given correct information.

At the outset of this litigation, the charge was made that even in November and December of 1985 – at the

time of indicating this was a one-time offer – the company might have contemplated or even intended to offer a later early retirement plan such as VRIP. The evidence certainly does not establish that position, and in fact the plaintiffs appear to have abandoned that type of claim. The evidence is clear that at the time in late 1985 when the company had decided to make VERO available it did not anticipate that there would be any further or later offers of early retirement, that it believed that it would be unable to make any such offers on a cost-neutral basis, and that no such offers were, indeed, anticipated.

To the extent there was any charge in this litigation initially that there was any intentional misleading of employees, the Court finds favorably to the defendant. The Court finds there was no intent to mislead. There was, indeed, an intent on the part of the company to provide accurate and full information that the employees would need in order to make their own individual decisions.

The Court also finds that there was no particular target or quota that the company had in mind for that initial program. The two objectives of that program were explained [p. 5] adequately to the then beneficiaries, and consisted first a cost reduction; and second, making the salaried force a little bit more lean in order to accomplish certain general reorganizations and restructure of those responsibilities.

It is appropriate, however – since this case does involve a claim of misrepresentation whether directly or indirectly or by omission – for the Court to carefully consider the particular representations that were made by

the company during the latter part of 1985 when the plaintiffs were called upon to make their election. The company first had several general meetings of employees, all employees, not limited merely to those who would ultimately be eligible for the VERO program. The general objective of those meetings was to announce the program and to give some assurance that this was not a part of any financial exigency on the part of the company, and was to be a purely voluntary decision by those who would be eligible for it.

Then within a matter of several days, a series of additional meetings were held scheduled by the company limited solely to those persons who were eligible under VERO. In preparation for those meetings, what's been described in this litigation as "packages" of information were prepared for each of the eligible employees generally outlining the nature of the plan, who was eligible, what the benefits were, and indeed attempting to show certain data for each individual employee [p. 6] in terms of the options as between normal early retirement, early retirement under VERO, and then normal or regular retirement at retirement age. Packages also were prepared for those who would present on behalf of the company this information concerning the type of discussion that should be had, and indeed even suggesting answers to possible questions.

At one of the very first meetings, one of the employees had asked about whether this would be made available in the future, and the information given was that this was a one-time offer and that one should not fail to take advantage of it in anticipation that the company would be making better offers at any later time, and that

there was no target number of persons or goal set as to how many people the company wanted to take these offers.

That information – if it was not already apparent – could and should have alerted the company to the potential that employees would want to know the possibility of such an offer for enhanced benefits on early retirement being offered at a later date. In its prepared materials, however, the company did not – as it should have – indicate to the employees that although there were no plans for any later offers and none were contemplated, that the company, of course, retained the right to consider and make offers at a later time, including offers to the very individuals to whom this offer was being made. Instead – as I have already indicated – the company in [p. 7] its formal presentations described this as a "one-time offer" without making clear that the meaning of that was that this particular program had to be accepted or rejected within the window before December 6th.

The general principles of trust law apply in a broad sense to obligations imposed on fiduciaries under ERISA. Ordinarily the company is not a fiduciary under ERISA. In this particular case, however, rather than having these matters handled directly through the Plan Benefit Committee, the company acted really simply as a corporate body in presenting this information and assumed fiduciary duties with respect to the information being given to the employees. Accordingly, although not ordinarily is the company obligated in any specific way with respect to information under ERISA – except as required by statute and regulations – the company on its own and

voluntarily took on that responsibility here as in the nature of a plan fiduciary.

There has been some suggestion and some argument made that the company in acting as a fiduciary had a special responsibility because of the potential benefit the company had through reduced savings resulting from those employees who did elect no longer being on the payroll. I reject, however, the argument that the company in some way has special obligations in this under any kind of self-dealing concept. On the other hand, the company did – by taking on these fiduciary responsi- [p. 8] bilities – have the responsibility to insure that the information given was accurate and full and not misleading.

By not giving the information that, although this was a one-time opportunity for this program, the company would, of course, retain the right to consider and make future similar offers, the company failed to give the information that the employees should have been given. Counsel have briefed the proposition as to what misrepresentation can consist of. In this particular case where there are fiduciary responsibilities, the obligation for full disclosure is greater than what it is in ordinary arm's length transactions.

In saying these various things, however, it should be emphasized the Court at the outset noted that the plaintiffs must establish that they were misled by those misrepresentations or failure to disclose, and that they would have made different choices if the company had – as it did for one of these plaintiffs – let it be known that "one can never say never".

One of the plaintiffs was at a meeting – apparently the only such meeting – where an answer to a question about what this "one-time offer " meant. The presenter at that meeting indicated that there simply were no plans to have any such later offer made, but that, of course, "one could never say never" – the intent being and the content being that the company did reserve the right to make such decisions at a [p. 9] later date if it chose to do so.

It may be noted that in preparing the questions and answers for discussion with union representatives, the company had anticipated – and to some degree, covered in those proposed answers – the very question that arises in this lawsuit. In those draft questions and answers, the suggested answer to one of the questions was that the company has no plans to offer again to salaried employees and does not plan at this time to offer it to hourly employees. If that type of communication rather than "this is a one-time offer" had been communicated, the Court would be inclined to have said there was nothing misleading or incomplete about the information given.

I do, however, conclude that the information was incomplete as it relates to eight of the nine plaintiffs. As it relates to Mrs. Huey who was at a meeting in which it was indicated that the "one-time offer" language did not foreclose the company from making an offer in the future, I must conclude that she did not rely upon the claimed misrepresentation here being made and must reject her claim.

I now turn to the other eight plaintiffs to evaluate the extent to which each of them did or did not rely upon this

information. All of them, by testimony, have indicated that they did rely on this information. And although their words were somewhat different, in general I think it can be said [p. 10] that they all indicated that, looking back now on the situation, they would not have made the choice to take early retirement if they had known that the company was reserving the right to make an offer, similar offer, or indeed even an enhanced offer in the future.

I have no doubt but that that testimony is believed by each of those persons to be accurate; that is, to state the truth of the matter. Obviously, there is a speculative nature as to that, because each such person is trying to respond as to how he or she would have reacted if matters had been different.

As to Mr. James Barnes, I conclude that he did rely on the misinformation and would not have made the choice of early retirement if it had been made clear that "never say never"; that is, that the company was not foreclosing the possibility of making another offer to the very same group of individuals at a later date.

Mr. Barnes was 56 at the time, had no particular plans about any early retirement, though the matter had at least occurred to him. He attempted to find out information concerning whether Sonat had made repeat offers to the same individuals. He went to one of the meetings prepared to ask such a question, and based upon the responses given, understood – and I think could well have understood – that there was a commitment that there would be no future offers of enhanced [p. 11] early retirement to this particular group of people.

I conclude that in his particular situation, he would not have made the choice under VERO if he had been told the truth of the matter, the full truth – namely, the company was not foreclosing that option if matters should change. I should at this time note that the change that occurred – that is, the announcement of the VRIP plan – came only really as a result of two intervening circumstances: One, a financially distressful situation for the company, at least from a budgetary standpoint as it was planning for its '88 year; and a change in accounting principles that, in effect, provided some additional funds in the trust that could be available for another early retirement incentive program.

I'll not keep the other plaintiffs in suspense, and instead simply say that as to each of the other seven plaintiffs that I have not already mentioned I'm going to find against them and conclude that they would, nevertheless, have taken this early retirement, the VERO, if the company had simply said that which it was obligated to say – namely, that it was not giving up its options to provide opportunities at a later date which might be more or less or the same as the ones being offered under VERO.

I recognize in making this decision that I am cutting a fine line by taking the testimony of one plaintiff, giving it full credit on this particular issue, and as to the other [p. 12] eight not giving their testimony on the same point credibility. I have struggled with the testimony given by each of the plaintiffs in order to make what I believe to be the correct decision.

I have already covered Mrs. Huey's situation. As it relates to Mr. Grefseng, he was 57 at the time and had generally planned to retire at age 62. He made his decision really before he had gotten the information about the so-called "one-time only" condition without, indeed, even knowing the full level of benefits.

As to Mr. Roy Kimberly, he was 61 years of age and he was in bad health at the time. He had considered a retirement situation. And I conclude in his case, as with Mr. Grefseng, that he would have retired even if he had known there was some option that the company had to make an offer at a later date which might be more or less than the offer then being made.

As to Mr. Lellwyn Lackey, he was 58 at the time and planned to retire at age 62. It should be noted as to each of these that the benefit level under VERO was substantially greater than an early retirement prior to age 62, and was greater than what the retirement benefits would be at age 62.

As to Willie Little, he was 63 at the time, he planned at that time to retire at age 65. I simply conclude that he would not have waited by a statement that the company, of course, might at some future time – which might be two years or [p. 13] three years or six years – have considered some additional early retirement plan.

As to Elliott Moore, he was 57 at the time and he planned to retire at age 62. As to Lillian Northington, she was 56, she planned to retire at age 62. She was unhappy with her present position, and indeed was expecting to request a transfer of jobs from her return to active work with the company. As to Joseph Patrick, he was 58, he

planned to retire at age 62, he was unhappy with his job. And for him, as to the others, I conclude that the corrective information that should have been given, nevertheless, would not have changed his decision.

By way of summary, I am concluding that Mr. Barnes has carried the burden of showing that he would not have made the decision that he did make had the corrective information been given, but that as to each of the other eight plaintiffs, they would have made the very same decision even if the company had made the disclosure it should have.

It should be noted that the information that should have been given, and as against which the Court must measure reliance, is not a disclosure that the company was planning to or would provide increased benefits. The only disclosure would have been that the company reserved the right to consider making benefits – whether higher or lower or the same – at any time in the future that it desired to do so. And [p. 14] it's only on the basis of that standard that I am trying to evaluate, have evaluated, the question of reliance.

A number of the plaintiffs, while giving their testimony that they didn't believe they would have selected early retirement if this had been known, were – when pinned down – much less clear in terms of, "well, if I had known that it might be *better* opportunities available later, I wouldn't have made that decision". These are, then, the factual findings the Court has made.

As to the situation of Mr. Barnes, it will be necessary to have further proceedings, or perhaps there can be

agreement as to the benefits lost by him. My understanding of the basic thrust of the complaint is that he would say – as all the other plaintiffs were saying in the request for relief – that he would have taken the VRIP option two years later, but that to the extent of the difference in the terms of the two offers as well as to the benefits lost really during the two years – two years salary matter – that those would be the losses that he would claim. Perhaps counsel can make a determination and find a way of resolving what the dollar amount of that would be without the need for further judicial proceedings.

In making these findings, I obviously do not expect either side to agree with the Court's findings. If there are, however, matters in these findings I have failed to cover – matters of dispute that I have failed to cover – I would [p. 15] appreciate if counsel could alert me to those now while this evidence is very clear in my mind. I've not attempted to cover all factual matters and all factual disputes, but instead simply to focus on those things that are critical to the outcome of the decision.

If counsel know of any matters – or if you think I have by slip of tongue misstated something that perhaps should be corrected – I would appreciate your advising me of those, or of those questions so I can address them now. Again, I'm not asking for any waiver of rights to file post-decision motions.

Do counsel know of any areas of factual disputes or legal disputes that I have not addressed?

MR. MORROW: If your Honor please, I didn't know who you wanted to go first. You haven't misspoke.

I mean, I didn't catch any misspeaks, and I don't have any quarrel with any of the facts as you found them.

I think that the plaintiffs have a problem, even under the theory that you have accepted that it was misleading not to include the remark that we had the right to do this again, to the extent that if that was pervasive because of the group and if they hadn't done it, hadn't accepted it, there would never have been a second offer and no damage. And you haven't spoken to that.

THE COURT: Well, my view is that the company must bear responsibility for the decisions that in fact were made, [p. 16] to the extent they were in fact induced by misleading information. I'm not sure if you're addressing that issue.

If the question you're raising is, well, if there had been nothing presented, no one would have done anything and no one would have gotten any benefits from it – if that's the kind of issue – I think from a legal standpoint is not a justifiable defense. But maybe I'm misunderstanding.

MR. MORROW: I guess I'm making a proximate cause argument. Their theory is nobody would take it if you had said this; and if we said this and done exactly what they said and nobody took it, then there wouldn't have been any VRIP, because nobody was going to repeat a futile thing. And therefore –

THE COURT: Well, my view is that people would have accepted it. A lot of people did, and my view is that at least eight of these nine plaintiffs would have

accepted, even if you had provided that correct information.

MR. MORROW: I think that's probably a pretty good argument in response to what I said.

MR. SMITH: Your Honor, in our last brief, one of the principles that we brought to the Court's attention about the fiduciary relation – I was just trying to find – I may be wrong, but I don't think this was in the self-dealing portion.

I think that under the fiduciary duty guidelines that the Court has used to find that the company should have done it [p. 17] differently, that there is a principle that plaintiffs need not show reliance.

In addition, in the Sixth Circuit in the related matter – and in this case, of course – the matter that the Court hasn't addressed of the summary plan description requirements, there is a direct holding that plaintiffs need not show reliance in order to recover for misleading communications.

THE COURT: Well, my view is that as it relates to the facts of this particular proceeding, that the plaintiffs must show reliance in order to obtain any of the benefits that the plaintiffs are seeking here. And it's not merely some voidable option where a company acting as a quasi fiduciary makes known in a fair and unintended way the summary of the plan or requirements, but with the unintended result of an ambiguous statement. I don't think the statements that were made were in and of themselves necessarily misleading. I think they were subject to being misunderstood.

And in that sense, I have believed that the plaintiffs were misled in the ambiguity of the statements that were given. But in that type of context, it is my view that they have to show they were misled to their detriment; that is that they would not have made the choice that they did make.

That's my view of the law in the area, and I did address it earlier in the context of self-dealing where you were talking about some higher standard. I do think it's a higher [p. 18] standard than simply in a transaction between two people at arm's length. I think there is an obligation for full disclosure, and a trustee or quasi trustee can be held for ambiguities that are misunderstood because of those ambiguities, provided there is some reliance upon it.

I wasn't trying to get into an argument with counsel on the matter, but simply see if there were any areas that could perhaps be clarified at this point so you knew what my ruling was. That is then the decision of the Court. Final judgment will not be entered as of this time.

Final judgment could be entered under 54(b) as to the other eight plaintiffs other than Mr. Barnes, but I see no reason to perhaps precipitate piecemeal appeals, should there be any. But I would expect counsel very promptly to see it you cannot resolve any kind of monetary dispute relating to Mr. Barnes's situation, so that we can go ahead and have a judgment entered that will start any time for appellate review, if it should be desired to do that.

(Court adjourned at 2:35 p.m.)

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF ALABAMA SOUTHERN DIVISION

JAMES L. BARNES,	)	Case No. CV88-P-1463-S
Plaintiff,	)	Birmingham, Alabama
vs.	)	February 27, 1990
ALABAMA GAS CORPORATION, ET AL.,	)	10:00 a.m.
Defendants.	)	

* * *

TRANSCRIPT OF FINAL JUDGMENT HEARING
HELD BEFORE THE HONORABLE SAM C.
POINTER, JR. UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	JEROME A. COOPER and JAY SMITH Cooper, Mitch, Crawford, Kuykendall & Whatley 409 North 21st Street Birmingham, Alabama 35203
For the Defendants:	JAMES WALKER MAY and JAMES S. CHRISTIE, JR. Bradley, Arant, Rose & White 1400 Park Place Tower Birmingham, Alabama 35203
Court Reporter:	KARLA R. ODOM, RPR-CSR 325 Hugo Black Courthouse 1729 Fifth Avenue North Birmingham, Alabama 35203

* * *

[p. 26] THE COURT: I will now dictate my findings and conclusions. These findings and conclusions relate to the [p. 27] issue of the relief to be granted to the plaintiff, James Barnes, as a consequence of the Court's earlier finding of liability on the part of Alabama Gas Corporation, the defendant.

The parties have stipulated to certain figures arrived at through negotiations, providing a framework for the Court's decision on this relief.

The central issue now remaining is the extent, if any, to which a monetary judgment may be awarded to Mr. Barnes that encompasses the lost back pay he sustained during the two year period that he was retired and during which he would not have been retired had the company made known to him its continuing right to make further changes in its Plan. I'm going to rule in favor of the plaintiff on this issue. And there are several reasons for doing so.

I am, of course, cognizant of the Supreme Court and Eleventh Circuit decisions which have been cited by both parties in their briefs. Section 502(a)(3) of ERISA authorizes the Court to grant injunctive relief to enjoin violations of the Act which is largely prospective in nature.

But it also, in Sub Part B of that subsection, authorizes the Court to grant other appropriate equitable relief to redress such violations. And this authorization is, indeed, in addition to the permission to grant other [p. 28] appropriate equitable relief to enforce the terms of the Act or the terms of the Plan.

The structure of Section 502(a)(3) indicates that the Court does have some latitude to determine what is appropriate equitable relief in addition to a mere injunction against further violations.

Money damages are frequently awarded by Courts as an element of equitable relief. Certainly, there's no more dramatic illustration of that than the relief granted under Title VII in which back pay, as a matter of routine, is granted in a circumstance of a discharge of a person in violation of that Act.

The language of many of the cases which hold that there may not be awarded any punitive damages or damages for emotional distress sometimes use the words "extra contractual damage" in indicating there is to be no extra contractual damage awarded under ERISA. It may be noted in this particular case that the damages of back pay really are not extra contractual.

They find that their meaning and definition in the contract, albeit one terminable at will, that existed between the plaintiff and the defendant in this case. The award of back pay is not an award for some unliquidated sum but, indeed, relates to the, and is governed by the, amount of money that was being provided under a contract [p. 29] that existed between the plaintiff and the defendant and which the Court has found would have continued in effect had not the plaintiff been improperly induced to abandon that contract.

This particular case may not have as broad implications for other areas of ERISA as might appear on the surface. This case is a peculiar one in that it is brought

against the defendant company, rather than against the Plan.

And the liability of the company here arises, so the Court has found, because the company essentially voluntarily assumed certain fiduciary responsibilities and duties that it might not and presumably would not otherwise have had. So, this is not a case in which, for example, damages are being awarded against a Plan for any kind of back pay. It is being awarded against the employer itself.

It is unnecessary for the Court to determine whether this same type ruling could apply in a situation in which an ERISA action was being brought against a Plan.

There is a very recent Eleventh Circuit case, Kane, K-A-N-E, versus Aetna Life Insurance, decided February 7, 1990, that has some significance. In that case, the Eleventh Circuit concluded that the Courts have authority to establish a body of federal common law to [p. 30] govern issues in ERISA actions not covered by the Act itself. The particular issues there related to ones of equitable estoppel and counsel may wish to look at the opinion. I'm not suggesting that the case is on all fours with this. But is does indicate that there is an area for the Court and, indeed, a responsibility for the Court to develop certain common law principles in areas in which the statute itself fails to cover those.

There is an issue that has been raised about Mr. Barnes' failure to seek other employment. I conclude that he had the duty to mitigate his damages even though he didn't know he had been damaged back at the time.

Nevertheless, a reduction of damages or the amount of equitable relief, more properly stated, is a matter on which the burden rests with the defendant, so that although the plaintiff had the burden or the duty to mitigate, it was the responsibility of the defendant in this action to have presented evidence showing that had he sought such employment, that comparable employment would have been available so that he could have mitigated these damages.

The argument is made by the defendant that there are non monetary benefits obtained by retirement and no doubt this is true.

Perhaps in some extreme circumstance, the Court [p. 31] might take into account those non monetary benefits and might take into account the failure of a plaintiff to take any form of action for an undue period of time barring the equitable relief that he seeks.

In this case, Mr. Barnes was not guilty of any laches after learning of the misrepresented matter but promptly did bring action on which he has ultimately prevailed.

The non monetary benefits here are not ones that the Court, in the exercise of equitable discretion, believes should be used to reduce the back pay he would have received; that is, the pay he would have received had he not been improperly induced to retire.

Consistent with these conclusions of law and, to some degree with the factual determinations that I've made, the stipulation of facts indicates that Mr. Barnes is to be awarded judgment in the amount of $93,664.28. This is a figure that the parties agreed by a compromise.

It reflects the difference in benefits between the two earlier retirement plans together with the loss of pay during that period of time between the two plans, really.

Accordingly, the clerk will enter a judgment, at this time, in favor of Mr. Barnes against the defendant in the amount of $93,664.28. Costs are taxed against the defendant.

[p. 32] This, of course, also constitutes a final judgment, not only with respect to the claim made by Mr. Barnes against the defendant but, also, with respect to the claims made by the other plaintiffs against the defendant on which the Court earlier had found in favor of the defendants. Accordingly, all judgments now will become final and subject to appeal.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

JAMES L. BARNES,
Plaintiff,
-vs.-
ALABAMA GAS CORPORATION,
Defendant.

CV 88-P-1463-S

ENTERED
March 6 1990

AMENDED CLERK'S COURT MINUTES

This action came on for trial on February 27, 1990, before the Court, the Honorable Sam C. Pointer, Jr., Chief United States District Judge, presiding. The issues having been duly tried,

It is ORDERED and ADJUDGED that pursuant to findings of fact and conclusions of law dictated into the record by the Court, judgment is entered in favor of the plaintiff, James L. Barnes, and against the defendant in the amount of $93,664.28. Pursuant to earlier findings of fact and conclusions of law the claims of the other plaintiffs are hereby dismissed. Costs taxed against the defendant.

DATE: March 6, 1990
Birmingham, Alabama
Court Reporter: Karla Odom

CHARLES T. CLIVER,
CLERK
By: /s/ Abbey C. Miles
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7228

JAMES L. BARNES, JR.,

Plaintiff-Appellee,

LEONARD GREFSENG, ROY R. KIMBERLY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON, JOSEPH D. PATRICK, LELLWYN B. LACKEY,

Plaintiffs-Appellants,

versus

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.C. SELF, ALABAMA GAS CORP., Alabama Gas Corporation,

Defendants-Appellees,
Appellants.

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING

(May 9, 1991)

BEFORE: FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge

PER CURIAM:

The petition(s) for rehearing filed by Appellants Leonard Grefseng, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick and Lellwyn B. Lackey is denied,

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge
